

2.24 PROPRIETARY ITEMS

2.24.01 Construction Contracts

The use of trade or brand names or the direct reference to patented or proprietary materials, specifications, or processes should be avoided in contracts. This applies to all projects, NHS and non-NHS, regardless of funding source. Generic construction specifications should be developed that will obtain the desired results as well as assure competition among equivalent materials or products. There are instances, however, where a particular proprietary product must be specified for use on a project.

If only patented or proprietary products are acceptable, they shall be bid as alternatives with all, or at least a reasonable number of acceptable materials or products listed. A reasonable number would be to specify in the contract two or three equally suitable products and include the term “or approved equal”. Note that additional wording shall be added to the specifications to more clearly define the phrase “or approved equal.” An example of this is the following:

For an alternative material to be considered an approved equal, the product shall have been lab tested and field trialed by the National Transportation Product Evaluation Program (NTPEP) and approved by the Department’s Materials and Geotechnical Program. Information for the NTPEP evaluation program can be found at <http://www.ntpep.org/Pages/RSCPReports.aspx>

If a product is on the approved Finding in the Public Interest (FIPI) list it will be noted in the specification and the term “or approved equal” is not to be used. Also, if four or more products are specified the term “or approved equal” should not be used and neither a FIPI or Certification is necessary. Therefore, when the use of a patented or proprietary (trade name) item is essential and only one item is to be specified in the contract for synchronization reasons or that no equally suitable alternative exists then a Certification is necessary; however, if only one, when there are equally suitable products; or if two or three items without the phrase “or approved equal” are to be specified in the contract then a FIPI is necessary.

CERTIFICATION

The Certification Process will require that the Residency Engineer (for project specific), Program Engineer (for regionwide use), or Branch Manager (for

statewide use) prepare documentation that shows (1) that no equally suitable alternative exists; or (2) that the item is essential for synchronization with existing transportation facilities. Once the documentation is complete, it shall be submitted to the Standards and Specifications Engineer for certification approval.

FIPI

Finding in the Public Interest will require that the Residency Engineer (for project specific), Program Engineer (for regionwide use), or Branch Manager (for statewide use) prepare and submit documentation (1) that no other products exist that meet CDOT requirements as an “approved equal” by being tested and proved in the field; or (2) that such patented or proprietary item is used for research or will be used for a distinctive type of construction on relatively short sections of road for experimental purposes. Once submitted, the FIPI documentation requires written approval by CDOT (for a specific project), or by the FHWA (if the FHWA determines that the project is a “Project of Division Interest [PODI]”, and for region-wide and statewide products). Additionally, when research is used as the justification for using a proprietary item it must be processed through the Research Branch of the Division of Transportation Development (See [Section 8.10 Experimental Items](#) in this manual).

See the attached flowchart, PROCESS FOR PREPARING “CERTIFICATIONS” OR “FINDING IN THE PUBLIC INTEREST” (FIPI) DOCUMENTS FOR PROPRIETARY ITEMS, for the process to follow for project specific, Region-wide, and State-wide approvals. (See Figure 2-2.)

A Certification or Finding in the Public Interest may be written for use of a proprietary item on a specific project or corridor, for use on a region-wide basis, or for use on statewide basis. A project-specific Certification or Finding in the Public Interest applies only to that one project and cannot be used to justify use of the proprietary item on other projects.

Copies of approved Region-wide and State-wide Certifications or Findings in the Public Interest shall be distributed to the Standards & Specifications Unit. The Standards & Specifications Unit will maintain a list of the approved products. Note that Certifications or Findings in the Public Interest shall be generally valid for three years unless otherwise specified.

Approved Certifications and Findings in the Public Interest are valid until any of the following criteria occurs:

1. Three years (or the specified time that was specified) has elapsed from date of approval.
2. New products are found or created that are equal to the products in the original Certification or Finding in the Public Interest.
3. Research has been completed on the patented or proprietary item and a recommendation for use of the product has been made.

If any of the above criteria occurs and the particular proprietary product must still be specified for use on a project, then another Certification or Finding in the Public Interest must be submitted for approval.

Once a proprietary item is accepted as meeting standards and a non-proprietary specification can be written, the material or product should be selected on a competitive basis.

See Figure 2-2 for a diagram of the approval process for use of proprietary items on a project.

2.24.02 Procurement Contracts

A justification letter approved by the Manager of Procurement and Contract Services to the files certifies that no equally suitable or patented item exists for use on the project and that such patented or proprietary item is essential for the construction of the project. Generally, products identified by their brand or trade name are not to be specified without an "or equal" or equivalent phrase.

A Sole Source Certification Form

[http://cdot/business/procurement/Documents/PurchManual MOD 2007.pdf](http://cdot/business/procurement/Documents/PurchManual_MOD_2007.pdf)

(page 45) shall be completed only for sole sources of goods or services. This certification does not apply to situations classified as "Emergency Procurement" covered by CRS 24-103-206.

2.24.03 Additional References:

1. 23 CFR Part 635.411, Material or Product Selection
2. FHWA Contract Administration Core Curriculum Participant's Manual and Reference Guide 2006
<http://www.fhwa.dot.gov/programadmin/contracts/coretoc.cfm>

